Supreme Court, U.S.
FILED
NOV 27 2001
OFFICE OF THE CLERK

(2)

No. 01-435

IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

v.

DONALD M. ISRAEL and MARK R. TAYLOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JAY D. FISCHER
FISCHER PORTER CALIGUIRE
& THOMAS, P.C.
Attorneys for Respondents
440 Sylvan Avenue
Suite 130
Englewood Cliffs, NJ 07632
(201) 569-5959

On the Brief:

ALAN C. THOMAS
BENJAMIN BENSON

170788

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Table of Appendices v

Statement of Facts and Procedural History 1

Reasons for Denying the Writ 3

I. This Court Cannot Grant Petitioner Relief Because Petitioner Failed To Demonstrate At Trial The Elements Essential For Obtaining A "Missing Witness" Inference. 5

II. The Missing Witness Rule Is Procedural And Governed By Federal Law. 10

III. The "Missing Witness Rule" Has No Place In Federal Courts. 11

IV. The Court Should Reject Petitioner's Invitation To Create A Per Se Rule For An Opponent's Former Attorney And Petitioner's Former Litigation Adversary. 12

V. Petitioner Was Not Denied A Fair Trial Because The Trial Court Never Pre-Judged His Counterclaims. 13

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

Cases:

Allstate Ins. Co. v. Shuler, 53 F.3d 331 (table), 1995 WL 258139 (6th Cir. 1995) 12

Deler v. Commodore Cruise Line, No. 92 Civ. 4473, 1995 WL 733655 (S.D.N.Y. Dec. 12, 1995) 6

Erie R.R. Co. v. Tomkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 10

Excel Handbag Co. v. Edison Bros. Stores, Inc., 630 F.2d 479 (5th Cir. 1980) 13

Hanna v. Plummer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 8 (1965) 10

Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044 (5th Cir. 1990), *reh'g denied*, 917 F.2d 559 (5th Cir. 1990) 10, 11, 12

Jones v. Otis Elevator Co., 861 F.2d 655 (11th Cir. 1988) 11

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 43 S. Ct. 422 (1923) 4

People v. Gonzalez, 68 N.Y.2d 424, 509 N.Y.S.2d 796, 502 N.E.2d 583 (1986) 7, 8

Cited Authorities

	Page
People v. Kitching, 78 N.Y.2d 532, 577 N.Y.S.2d 321, 583 N.E.2d 944 (1991)	7
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S. Ct. 614 (1955)	4
Russell v. National Railroad Passenger Corporation, 189 F.3d. 590 (7th Cir. 1999)	6
Savage v. Thomas J. Shea Funeral Home, Inc., 212 A.D.2d 875, 622 N.Y.S.2d 363 (3 Dept. 1995)	9
Stich v. United States, 730 F.2d 115 (3d Cir. 1984), *cert. denied*, 496 U.S. 917, 105 S. Ct. 294, 83 L. Ed. 2d 229 (1984)	13
United States v. Adeniji, 31 F.3d 58 (2d Cir. 1994)	6
United States v. Barton, 176 F.3d 476 (table), 1999 WL 181682 (4th Cir. 1999)	6, 12
United States v. Caccia, 122 F.3d 136 (2d Cir. 1997)	6
United States v. Fermin, 208 F.3d 223 (table), 2000 WL 203794 (9th Cir. 2000)	12
United States v. Myerson, 18 F.3d 153 (2d Cir. 1994)	5
United States v. Torres, 845 F.2d 1165 (2d Cir. 1988)	5, 6, 9, 12

Cited Authorities

Page

United States Constitution:

Fifth Amendment 12

Rules:

Federal Rule of Civil Procedure 60(b) 3

United States Supreme Court Rule 10 3

Other Authorities:

McCormick, On Evidence § 272 12

TABLE OF APPENDICES

Page

Appendix A — Excerpts From Final Pretrial Order Of The United States District Court For The Southern District Of New York Dated September 27, 1999 ..... 1a

Appendix B — Notice Of Appeal Dated October 9, 2001 ..... 4a

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This action, and all of its many, many incarnations, stems from a business divorce between Petitioner Daniel E. Carpenter ("Petitioner") and Respondents Donald M. Israel and Mark R. Taylor ("Respondents"). In 1984, the parties formed Benefit Concepts, Inc. for the purpose of selling life insurance and qualified retirement plans through the New England Mutual Life Insurance Company. By the middle of 1991, the parties' business relationship had completely deteriorated. On September 3, 1991, the parties' formalized their business divorce by executing the Buy-Out Agreement.

The trial in this matter centered on the interpretation of Paragraph 11 of this Agreement, which made provisions for the transfer of the parties' pro-rata interest in shares of stock in the Omega Reinsurance Company which Petitioner held. (Petitioner's App. at 9a). Despite the clear language of Paragraph 11 and Respondents' repeated demands, Petitioner failed to provide Respondents with their respective shares of this stock. Thereafter, Respondents filed suit against Petitioner for, among other things, breach of Paragraph 11.

A Bench Trial was held on February 28 and 29, March 1 and April 18, 2000 before United States Magistrate Judge James C. Francis, IV, of the United States District Court for the Southern District of New York. Prior to the commencement of this trial, and during discovery, neither party sought to subpoena, depose and/or interview the purported draftsman of the Buy-Out Agreement, Respondents' former attorney, Stephen Herbert, Esq. ("Herbert").

Moreover, neither party identified Herbert as a trial witness in the Final Pre-Trial Order submitted to Judge Francis on September 27, 1999. (Respondents' App. A at 2a). During the trial, Petitioner also made no attempts to call Herbert as a witness.

On September 22, 2000, the trial court issued its Memorandum Opinion and Order directing the Clerk to enter judgment against Petitioner and in favor of Respondents in the total amount of $584,124.05. (Petitioner's App. B). In this memorandum opinion, the trial court ruled that the Missing Witness Rule was inapplicable, and that an adverse inference should not have been drawn, because Herbert was equally available to both sides. (Petitioner's App. B. at 17a-18a). The Clerk ultimately entered judgment on September 26, 2000.

Petitioner also declined to raise his counterclaims of breach of fiduciary duty and restitution, simply because the trial court, in an exercise of its discretion and without any indication of prejudgment, warned Petitioner that he would be sanctioned if he did not prevail on said counterclaims.

Petitioner then filed a timely Notice of Appeal of the final judgment entered by the trial court on October 6, 2000, with the United States Court of Appeals for the Second Circuit. (Respondents' App. B). On May 3, 2001, the United States Court of Appeals for the Second Circuit issued its Summary Order affirming the judgment of the trial court in all respects, except as to the calculation of damages and pre-judgment interest. (Petitioner's App. A). The United States Court of Appeals also denied Petitioner's Petition for Panel Rehearing. The Petition to this Court arises from the

Second Circuit's Summary Order,[1] and should be denied for the reasons that follow.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." As Justice Frankfurter recounted:

> [I]t is very important that [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and of cases in which there is real and embarrassing conflict of opinion . . . [in the lower courts].

---

1. As the trial court noted, "this case has a long and rather tortured history," (Petitioner's App. at 6a), and it is far from any resolution. Upon remand, the trial court recalculated the damages and pre-judgment interest and directed the Clerk to enter judgment in favor of Respondents and against Petitioner in the total amount of $491,639.26. (Petitioner's App. C). The Clerk ultimately entered judgment on September 10, 2001. Petitioner's motion for relief pursuant to Federal Rule of Civil Procedure 60(b) was denied by the trial court, which characterized the motion as "entirely frivolous." Petitioner has appealed the new damage and interest calculations to the Second Circuit. *Carpenter v. Israel, et al.*, U.S. Court of Appeals for the Second Circuit, Docket No. 01-9175 (filed October 9, 2001). And as further evidence of the type of bullying referred to by the trial court, (Petitioner's App. at 21a), Petitioner has caused one of his inactive business entities to file another law suit against Respondents. *Voluntary Benefit Systems, Inc. v. Israel et al.*, U.S.D.C. S.D.N.Y, Case No. 01-CV-8518 (BDP) (filed September 18, 2001).

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79, 75 S. Ct. 614, 619 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) (Taft, C.J.)).

The questions Petitioner presented do not rise to the level of such importance. Petitioner claims the trial court erred by applying the Second Circuit version of the so-called "Missing Witness Rule" rather than the New York version of the rule. Petitioner, however, cannot meet his burden of proving he properly invoked the Missing Witness Rule under either law.

Petitioner also claims his due process rights were violated when the trial court advised him that sanctions would be imposed if Petitioner pursued counterclaims for breach of fiduciary duty and restitution at trial. The trial court, which was fully familiar with Petitioner's intrigues over the many years of litigation, noted the parties' release of claims in the "divorce" agreement and properly issued its admonishment.

For these reasons, and the reasons that follow, Respondents respectfully request this Honorable Court to deny the Petition for a Writ of Certiorari. In the event, the Court grants the Writ, Respondents respectfully contend the following: (1) the Missing Witness Rule has no place in the federal courts since the advent of the Federal Rules of Evidence and the Federal Rules of Civil Procedure or, in the alternative, (2) the Missing Witness Rule is governed by federal law.

I. THIS COURT CANNOT GRANT PETITIONER RELIEF BECAUSE PETITIONER FAILED TO DEMONSTRATE AT TRIAL THE ELEMENTS ESSENTIAL FOR OBTAINING A "MISSING WITNESS" INFERENCE.

Petitioner would not be entitled to a "missing witness" inference under any law, including Petitioner's view of New York law. Therefore, this Court cannot grant the relief Petitioner seeks. Accordingly, the Petition must be denied.

Under federal law, as set forth by the Court of Appeals for the Second Circuit:

> When "a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction" and fails to produce such witnesses, the jury may infer that the testimony, if produced, would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121, 14 S.Ct. 40, 41, 37 L.Ed. 1021 (1893) [other citations omitted]. However, when a witness is equally available to both sides, "the failure to produce is 'open' to an inference 'against both parties.' " [citations omitted]. No instruction is necessary where the unpresented testimony would be merely cumulative. [citations omitted].

United States v. Torres, 845 F.2d 1165, 1169 (2d Cir. 1988). *See United States v. Myerson*, 18 F.3d 153, 158 (2d Cir. 1994). For a witness to be peculiarly in a party's control, the Rule's

proponent has to lack meaningful or pragmatic access to the witness. *United States v. Caccia*, 122 F.3d 136, 139 (2d Cir. 1997). If the witness is equally available, no inference is drawn against the non-producing party. *United States v. Adeniji*, 31 F.3d 58, 65 (2d Cir. 1994). Moreover, courts have been reluctant to find a witness practically unavailable when it appears that the defense had no real interest in calling the witness to the stand and did not make the slightest attempt to locate him or seek out his availability, but instead is engaged in a form of gamesmanship in an effort to obtain a missing witness charge. *Torres* at 1169, *Deler v. Commodore Cruise Line*, No. 92 Civ. 4473, 1995 WL 733655 at *5 (S.D.N.Y. Dec. 12, 1995).

Before and at trial, Petitioner made no effort whatsoever to establish factually an entitlement to the adverse inference. He offered no evidence — no testimony, nor exhibits — to support his application. Indeed, as the trial court aptly noted, "There is no indication that [Petitioner] ever attempted to locate Mr. Herbert, interview him, take his deposition, or call him as a witness." (Pet. App. at 18a). Thus the trial court correctly observed that the Petitioner failed to show Herbert was available and under Respondents' control. Failing these essential prerequisites of the Missing Witness Rule in the Second Circuit, Petitioner was correctly denied use of any adverse inference. *See Russell v. National Railroad Passenger Corporation*, 189 F.3d. 590, 595-96 (7th Cir. 1999) (no basis to request missing witness/evidence charge when proponent never requested the documents in discovery); *United States v. Barton*, 176 F.3d 476 (table), 1999 WL 181682 (4th Cir. 1999) (the fact that alleged co-conspirator was in federal custody in another jurisdiction did not render him unavailable to defendant who could have requested a writ of habeas corpus ad testificandum).

Petitioner's efforts would also fail under New York law. As the New York Court of Appeals observed, the mere failure to produce a witness at trial is insufficient to justify the charge. The proponent must show that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; that the witness would naturally be expected to provide non-cumulative testimony favorable to the party who has not called him, and that the witness is available to such party. *People v. Gonzalez*, 68 N.Y.2d 424, 427, 509 N.Y.S.2d 796, 799, 502 N.E.2d 583, 586 (1986).[2]

Moreover, New York requires that the party seeking the inference, or charge, to notify the court as soon as practicable. *People v. Kitching*, 78 N.Y.2d 532, 577 N.Y.S.2d 321, 583 N.E.2d 944 (1991). If this information is available before

---

2. The *Gonzalez* court also set forth the evidence necessary to defeat a request for the adverse inference:

> [T]he opposing party, in order to defeat the request to charge, [must] account for the witness' absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that the witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not "available", or that the witness is not under the party's "control" such that he would not be expected to testify in his or her favor. In order to allow for effective judicial review, it is imperative that all discussions regarding this matter be clearly set forth on the record so that the respective positions of each party are readily discernible.

Gonzalez, 68 N.Y.2d at 428, 509 N.Y.S.2d at 799, 502 N.E.2d at 586.

trial, the proponent of the charge must promptly notify the court. Regardless of when the information is available, the issue must be raised so "the court can appropriately exercise its discretion and the parties can tailor their trial strategy to avoid 'substantial possibilities of surprise'." *People v. Gonzalez*, 68 N.Y.2d 424, 427-28, 509 N.Y.S.2d 796, 799, 502 N.E.2d 583, 586 (1986).

Petitioner does not, and cannot, contend that he complied with his notice obligations, a fundamental prerequisite of New York law. The Final Pre-Trial Order ("PTO") in this matter was prepared by the parties and signed by the Court on September 27, 1999, in accordance with the Federal Rules of Civil Procedure. Each party set forth in the PTO the witnesses each intended to call. Mr. Herbert is not listed among the witnesses (for either side). (Respondents' App. A at 2a). At that moment, Petitioner's duty to give notice of his intent to invoke the "Missing Witness Rule" arose, which he failed to do, despite the fact the trial did not commence until February 28, 2000, five months later. There was no notice, and thus New York's law offers no help to Petitioner.

Moreover, Petitioner failed at trial and before this Court to demonstrate that it would have been "natural" for Respondents to present Herbert's testimony. Indeed, his testimony, at best, would have been cumulative and barely relevant. The issue for trial was the parties' intention when they agreed to Paragraph 11 of the Buy-Out Agreement. (Petitioner's App. at 14a). If Herbert was the only person in the world who could testify as to the parties' intent with regard to the Agreement, then it might have been natural to expect Respondents to call him as a witness.

In this matter, however, all of the parties, including Petitioner, had the same, if not greater, amount of knowledge and information needed to accurately testify regarding the parties' intent. Unsurprisingly, all of the parties to the Agreement, Petitioner and Respondents, testified at trial as to their respective intent. As such, Herbert's testimony was unnecessary, *i.e.*, it would not have been "natural" to call Herbert to testify. *Accord Savage v. Thomas J. Shea Funeral Home, Inc.*, 212 A.D.2d 875, 876, 622 N.Y.S.2d 363, 364 (3 Dept. 1995) (in action against funeral home for negligent failure to prepare body for services and burial, plaintiff was not entitled to missing witness charge for defendant's failure to produce employee who assisted employer in the preparation of body because the employee's testimony would have been cumulative to that of the employer who testified).

Indeed, Petitioner admitted at trial that he was actively involved in all of the contract negotiations, was given ample opportunity to review the entire Agreement, and to change any provisions with which he did not agree. (Transcript of Trial before the Honorable James C. Francis, IV, February 29, 2000 at 422, 434-35). Moreover, Petitioner read, initialed and signed the entire Agreement, including Paragraph 11, and conceded that he was completely satisfied with its contents. *Id.* at 422 and 424.

Finally, federal appellate courts "loath" to reverse a trial court's use of the "Missing Witness Rule." *Torres*, 845 F.2d at 1170-71. The decision rests in the sound discretion of the trial court and there is a "deserved reluctance to remove the issue" from the trial court because of the "usual aura of gamesmanship that frequently accompanies requests for a missing witness charge as to which the trial judge will have a surer sense than an appellate court." *Id.*

For the reasons stated above, Petitioner cannot prove entitlement to the benefits of the Missing Witness Rule under either federal or New York law. Accordingly, the Petition for a Writ of Certiorari should be denied.

II. THE MISSING WITNESS RULE IS PROCEDURAL AND GOVERNED BY FEDERAL LAW.

In determining whether federal or state substantive law governs the applicability of the Missing Witness Rule, this Court should adopt the definitive standard set forth in *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048 (5th Cir. 1990), *reh'g denied*, 917 F.2d 559 (5th Cir. 1990). The *Herbert* Court conducted an *Erie* analysis and determined that the applicability of state substantive law regarding this rule is not required, pursuant to *Erie v. Tomkins*. *Herbert* at 1048.

In *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court held that federal courts must apply state substantive law when adjudicating state law claims. Federal law, however, must be applied when adjudicating procedural matters. *Hanna v. Plummer*, 380 U.S. 460, 465, 85 S. Ct. 1136, 1140, 14 L. Ed. 8 (1965). Whether a particular provision is substantive or procedural for *Erie* purposes is determined by looking at the twin aims of the *Erie* Doctrine: 1) the discouragement of forum shopping; and 2) the avoidance of inequitable administration of the laws. *Id.* at 468, 85 S. Ct. at 1142.

With regard to forum shopping, it is almost impossible to conceive a situation in which the Missing Witness Rule would affect a party's choice to sue in or remove an action to federal court. *Herbert* at 1048. With regard to the second aim, the Missing Witness Rule is not bound up with

the definition of the rights and obligations of the parties under state law, so that denying the inference would result in different treatment between those parties suing in federal court and those in state court. *Id.* In fact, the Missing Witness Rule bears no more relation to the elements of a state law claim or defense than any other evidence from which the fact finder may infer an evidentiary or ultimate fact. *Id.*

In this federal diversity action, the Missing Witness Rule had absolutely no place, as is it clearly a procedural matter. The trial took place in a federal court. Accordingly, the procedures and methods used by the trial judge to manage this federal trial, which include the decision to render inferences and/or specific charges regarding the Missing Witness Rule, were governed not by state substantive law, but by the Federal Rules of Civil Procedure and Rules of Evidence.

For these reasons, no other conclusion can be made, except that the Missing Witness Rule is properly classified as procedural and that federal law governs its applicability in this matter. Accordingly, the Petition should be denied.

III. THE "MISSING WITNESS RULE" HAS NO PLACE IN FEDERAL COURTS.

For the reasons set forth at length in *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1045-48 (5th Cir. 1990) (*dicta*), *reh'g denied*, 917 F.2d 559 (5th Cir. 1990) and noted in *Jones v. Otis Elevator Co.*, 861 F.2d 655, 660 n.4 (11th Cir. 1988) (*dicta*), Respondents respectfully contend that the "Missing Witness Rule" has no place in the federal courts. As the Fifth Circuit noted, the "evidentiary scheme created by the Federal Rules of Evidence, as complimented by the Federal Rules of

Civil Procedure, renders [the rule] an anachronism." *Herbert*, 917 F.2d at 1048, *Accord Allstate Ins. Co. v. Shuler*, 53 F.3d 331 (table), 1995 WL 258139 (6th Cir. 1995) (without discussion, citing *Herbert*).

IV. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO CREATE A PER SE RULE FOR AN OPPONENT'S FORMER ATTORNEY AND PETITIONER'S FORMER LITIGATION ADVERSARY.

It is entirely inappropriate for this Court to establish a per se rule whereby an opponent's former attorney and the proponent's former litigation adversary would automatically be considered "unavailable" under the Missing Witness Rule. Petitioner has not offered any precedent, or statutory authority, to establish the existence of such a rule. No such authority exists. Moreover, both the trial and appellate courts had a clear opportunity to determine whether such a rule existed and, if so, whether it should have been applied in this matter. Both courts, however, deemed it completely unnecessary to make such a determination. *See Torres*, 845 F.2d at 1171 (citing McCormick, On Evidence § 272 at 807 ("a practice which gives a party a right to [a missing witness] instruction is undesirable")). *See United States v. Barton*, 176 F.3d 476 (table), 1999 WL 181682 (4th Cir. 1999) (even though alleged co-conspirator would likely assert a Fifth Amendment privilege, no missing witness charge was warranted because the likelihood did not place it particularly in the Government's power to produce the witness), *United States v. Fermin*, 208 F.3d 223 (table), 2000 WL 203794 (9th Cir. 2000) (request for missing witness charge denied because the witness never actually took the Fifth Amendment and was never subpoenaed). Accordingly, it would be

inappropriate for this Court to now create a new rule regarding Herbert's unavailability. The Petition, therefore, must be denied.

V. PETITIONER WAS NOT DENIED A FAIR TRIAL BECAUSE THE TRIAL COURT NEVER PRE-JUDGED HIS COUNTERCLAIMS.

The conduct of a fair trial is left to the sound discretion of the trial judge and an appellate court should not retroactively substitute its judgment for that of the trial judge, unless there has been an abuse of discretion. *Stich v. United States*, 730 F.2d 115,119 (3d Cir. 1984), *cert. denied*, 496 U.S. 917, 105 S. Ct. 294, 83 L. Ed. 2d 229 (1984); *Excel Handbag Co. v. Edison Bros. Stores, Inc.*, 630 F.2d 479 (5th Cir. 1980).

In this matter, absolutely no evidence exists in the record to support Petitioner's belief that the trial court pre-judged his counterclaims. At trial, the Judge, in an exercise of his discretion over the conduct of a trial, simply told Petitioner's counsel that, based on the clear language of a release contained in paragraph 26 of the Agreement, (Petition at 13), counsel should be careful in wasting the Court's time by raising these counterclaims. Moreover, the trial court also told Petitioner's counsel that they could raise their counterclaims, but would be sanctioned only if they do not prevail. (Petition at 13). The trial court never stated, nor indicated, that Petitioner would not prevail.

In making this argument, however, Petitioner asks this Court to re-write history. He wants this Court to undo *his choice* of withdrawing his counterclaims, because he now realizes that such a choice may have been incorrect. Since

he has no valid justification to make such a request, he is now relegated to brazenly portraying the trial court as unjust and biased towards him.

Finally, the trial court did not create the Scylla and Charybdis. Instead, Petitioner concocted this imaginary hazard to further support his flawed claims against the trial court. The trial court never told Petitioner what course his choice had to take, or that he would not prevail. He was free to withdraw his counterclaims, or to simply convince the trial court that they were meritorious. The fact that Petitioner voluntarily chose to withdraw counterclaims, which he obviously thought had no merit, does not create the equivalent of the Trial Court forcing him to crash into a rock with a sea monster on it.

Based on the foregoing facts, it is clear that the trial court did not prejudge Petitioner's counterclaims. This Court, like the United States Court of Appeals for the Second Circuit, should disregard Petitioner's rational for not raising the counterclaims and treat it for what it is, utter nonsense.

CONCLUSION

For the foregoing reasons, Respondents Donald M. Israel and Mark R. Taylor respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

JAY D. FISCHER
FISCHER PORTER CALIGUIRE
& THOMAS, P.C.
Attorneys for Respondents
440 Sylvan Avenue
Suite 130
Englewood Cliffs, NJ 07632
(201) 569-5959

On the Brief:

ALAN C. THOMAS
BENJAMIN BENSON

APPENDIX

APPENDIX A — EXCERPTS FROM FINAL PRETRIAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 27, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 95-2703
(DAB)(JCF)

DONALD M. ISRAEL and, MARK R. TAYLOR,

Plaintiff,

v.

DANIEL E. CARPENTER, BENEFIT CONCEPTS NEW YORK, INC. and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

FINAL PRETRIAL ORDER

The parties having conferred among themselves with the Court pursuant to F.R.C.P. 16, now therefore the following statements, directions, and agreements are adopted as the Pretrial Order herein:

1. *JURISDICTION — VENUE*:

This action is brought pursuant to 28 U.S.C. section 1332.

Appendix A

2. *JURY/NON-JURY*:

The parties have agreed to waive trial by jury.

The parties have agreed that the Honorable James C. Francis IV will conduct all proceedings in the case pursuant to 28 U.S.C. Sec. 636(c).

* * *

[15] * * *

7. *WITNESSES*:

Plaintiffs:
Donald M. Israel
Steven Gucciardi or another representative from The New England
Mark Taylor
Kenneth Murrell (By deposition)

Defendants:
Daniel Carpenter
Molly Carpenter
John Olson
Donald Israel
Mark Taylor (By deposition)
Kenneth Murrell (By deposition)
Jack Robinson

* * *

Appendix A

[23] 13. MODIFICATION OF ORDER. IT IS ORDERED that the Court may in order to prevent manifest injustice or for good cause shown, at the trial of the action or prior thereto upon application of counsel for each party, made in good faith, or upon motion of the court, modify this Pretrial Order upon such condition as the Court may deem just and proper.

s/ Woody Hong
Attorney for Plaintiff

s/ Seth Marcus
Attorney for Defendant

SO ORDERED.

JAMES C. FRANCIS, IV
UNITED STATES MAGISTRATE
JUDGE

Dated: September 27, 1999
New York, New York

APPENDIX B — NOTICE OF APPEAL DATED OCTOBER 9, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 2703 (DAB)(JCF)

DONALD M. ISRAEL and MARK R. TAYLOR,

Plaintiffs,

– against –

DANIEL E. CARPENTER, BENEFIT CONCEPTS NEW YORK, INC., and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that DANIEL E. CARPENTER, a defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Second Circuit from:

(a) the final judgment entered after remand in this case on September 7, 2001; and

(b) the denial of Carpenter's motion pursuant to Fed. R. Civ. P. 60(b).

Appendix B

Dated: Stamford, CT
October 9, 2001

DANIEL E. CARPENTER,
By his attorney,

s/ Jack Robinson/sm
Jack E. Robinson (JR 5124)
Clearwater House
2187 Atlantic Street
Stamford, CT 06902
(203) 425-4500